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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MAY - 4 1992

In the Matter of)
)
Amendment of Section 76.51)
of the Commission's Rules to)
Include Clermont, Florida in the)
Market Presently Designated the)
"Orlando-Daytona Beach-Melbourne-)
Cocoa, Florida" Market)

Federal Communications Commission
Office of the Secretary

RMI 7995

TO: The Commission

PETITION FOR EXTRAORDINARY RELIEF (CORRECTED)

1. Press Broadcasting Company, Inc. ("Press"), permittee of Station WKCF(TV) ("WKCF"), Clermont, Florida, hereby requests that the Commission issue a ruling specifically stating that, because of the unique set of circumstances described below, WKCF will be deemed to have been a "local" signal in the Orlando-Daytona Beach-Melbourne-Cocoa television market from January 1, 1990 through June 30, 1991 so that carriage of the station by cable systems in that market was exempt from copyright liability during that period.

Regulatory Background

2. Prior to 1976, for purposes of its then-operative mandatory carriage rules, the Commission adopted a listing of markets to be utilized in determining whether any particular broadcast signal was to be deemed "local" or "distant" with respect to any particular cable system. That listing is still set forth in Section 76.51 of the Commission's Rules. In general, a station which was licensed to any community appearing in the title (or "designation") of any listed market was deemed "local" for any cable system in any other designated community in that market. This distinction between "local" and "distant" affected the station's mandatory carriage status under the

Commission's "must-carry" rules. It also determined whether the cable operator would be liable for copyright royalties: carriage of "local" signals was, and remains, exempt from such royalties, while carriage of "distant" signals was and is not so exempt. *See* 17 U.S.C. §111(f).

3. In 1985, and again in 1987, the United States Court of Appeals for the District of Columbia Circuit held the Commission's "must-carry" rules to be unconstitutional. *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied sub nom. Nat'l Ass'n of Broadcasters v. Quincy Cable TV, Inc.*, 106 S.Ct. 2889 (1986); *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987). Accordingly, while those rules technically remain on the Commission's books, they have for more than four years been moribund.

4. That is not, however, the case in the copyright area. There the Copyright Office continues to view the Commission's defunct "must-carry" rules as controlling with respect to the crucial "local"/"distant" distinction even though those rules are no longer actively enforced by the Commission.^{1/}

5. While the Commission has effectively abandoned "must-carry" regulation, it has not abandoned a number of closely related policies involving limitations on program exclusivity. *See, e.g., Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, Gen. Docket No. 87-24, Further Notice of Proposed Rule Making, 3 FCC Rcd 6171 (1988). All of those policies -- "must-carry", territorial exclusivity, syndicated exclusivity, exemption from copyright for carriage of "local" stations -- are unquestionably intertwined, interrelated and interdependent, as the Commission itself has clearly acknowledged. *See generally id.* at 6174-6176.

^{1/} The Copyright Office's position in this regard is dictated by Section 111 of the Copyright Act of 1976, which continues to mandate that a station will be deemed "local" and, therefore, exempt from retransmission copyright liability, if the station was entitled to mandatory carriage rights under the "must-carry" rules in effect in April, 1976. *See* 17 U.S.C. §111(f).

Factual Background

6. Press commenced operation of WKCF in late 1988, after the "must-carry" rules had been declared unconstitutional. As a start-up independent station, Press encountered its share of hardships as it entered into competition with well-established network affiliates and other independent stations. Most strikingly, Press found that program suppliers from whom it obtained programming were willing to deal with WKCF only as a full-market competitor. That is, rather than treat WKCF as a "Clermont" station serving merely some "Clermont" market, virtually all of the station's program suppliers treated WKCF as just one more Orlando station and, therefore, charged rates equivalent to those charged stations licensed to the designated communities (*i.e.*, Orlando, Daytona Beach, Melbourne and Cocoa). In so doing, they demonstrated their recognition that Press was entitled to secure both territorial exclusivity throughout the Orlando-Daytona Beach-Melbourne-Cocoa market and cable carriage to deliver the programming throughout the market.

7. Some program suppliers and cable operators, however, raised questions about this particular point. Similarly, some cable operators also questioned whether WKCF would be treated as a "local" or "distant" signal for copyright purposes. Accordingly, in September, 1989, Press requested that the Commission issue a declaratory ruling establishing WKCF's "local" status.

8. In its request, Press specifically and expressly noted the interrelationship of the "must-carry" rules, copyright liability, and program exclusivity. Press also specifically and expressly stated that the request was necessitated because

some cable operators have expressed uncertainty as to the extent of exclusivity to which Press is entitled -- and, indeed, even as to whether [WKCF] should be carried at all on their systems because of potential copyright liability.

Press Letter Request at 6. The Commission invited comments on Press' request and at least one party argued that Press was seeking, in effect, to have Clermont added to the market designation; that party urged that the relief sought by Press (*i.e.*, market redesignation) could be appropriately granted only through the rule making process. *See Request for Ruling by Press Television Corporation Concerning*

Applicability of Section 73.658(m) of the Commission's Rules in the Orlando-Daytona Beach-Melbourne-Cocoa Television Market, 4 FCC Rcd 8799, 8800, ¶7 (1989).

9. In December, 1989, the Commission issued a Memorandum Opinion and Order, *id.*, in which it declared, "given the structure of the Orlando-Daytona Beach-Melbourne-Cocoa market and the location of WKCF(TV) within it, that there can be little doubt that WKCF(TV) is in fact unavoidably competitive with other stations in the market." 4 FCC Rcd at 8800. In response to the argument that rule making would be the more appropriate means of granting Press relief, the Commission stated that

We do not intend to abandon the general policy of treating market structure issues through the Rule Making process. . . . However, where there is a factual pattern as unambiguous as that here and the rule appears to be functioning in conflict with its intended purpose, we will not decline to act during the interim period until the matter is addressed in Docket 87-24.

4 FCC Rcd at 8801, ¶12.

10. The Commission did not expressly address the copyright-related implications inherent in its decision. However, the unequivocal determination that WKCF(TV) is "unavoidably competitive with other stations in the market", together with the express rejection of the argument that any further rule making to redesignate the market might be necessary or even appropriate, indicated to Press that WKCF(TV) was to be deemed "local" for all relevant purposes, including copyright.

11. This conclusion was especially reinforced by the Commission's own citation to Docket No. 87-24. That proceeding is directed toward possible revision of the Commission's program exclusivity rules. But in the *Further Notice of Proposed Rule Making* cited by the Commission in its ruling on Press' request, the Commission went out of its way to request comment as to

whether [the Section 76.51 list] has become outdated in view of the many new television stations that have commenced operation since the list was incorporated in our rules. In view of this development, we believe that it may be appropriate to update the list of television markets application to [the program exclusivity] rule to reflect current market designations. . . . We request comment on these matters with respect to modifications to the list of television markets specified in Section 76.51 of our rules.

3 FCC Rcd 6171, 6176, ¶35 (1988). In other words, the Commission itself had already clearly

signaled its view that matters relating to program exclusivity go hand-in-hand with matters relating to the Section 76.51 market listing. Further, by citing to Docket No. 87-24, and by simultaneously rejecting the argument that Press and the Commission should undertake a rule making proceeding to modify the market designation, in Press' view the Commission created the impression that its ruling on Press' request was intended to encompass *all* related matters, including not only territorial exclusivity, but also copyright matters as well.

12. Press was not the only party who recognized that the Commission's ruling could be read in this manner. One of the opponents of Press' request sought reconsideration of the Commission's ruling, arguing that that ruling

easily could lead to great harm to local cable systems . . . which interpret the waiver of Section 73.658(m) as a *de facto* re-hyphenation of the market. In such cases, those cable systems could become exposed to serious copyright liabilities should they file their mandatory Statements of Account with the Copyright Office claiming the WKCF(TV) is local.

Petition for Reconsideration of Meredith Corporation, filed January 11, 1990, at 13-14. Whether or not that particular petitioner chose to interpret the Commission's ruling in that manner, it is undeniable that the petitioner recognized that the ruling *could* "easily" be interpreted that way.

13. And, indeed, at least one cable operator in the vicinity of Cocoa, Florida did elect to treat WKCF(TV) as a "local" station and so reported it on its copyright Statements of Account for the period January 1, 1990 (*i.e.*, the period immediately following the Commission's ruling) through June 30, 1991. The Copyright Office notified that cable operator that, according to the Copyright Office's analysis, WKCF(TV) should be deemed a "distant" signal not exempt from copyright royalties for cable retransmission. While Press and the cable operator called the Commission's ruling (as well as other relevant authority) to the attention of the Copyright Office, the Copyright Office continued to maintain, in September, 1991, that absent an express ruling from the Commission, the

station should be treated as "distant". See Attachment A hereto.^{2/}

14. In November, 1991, the Commission denied the petitions for reconsideration of its 1989 ruling. In its reconsideration order, the Commission addressed the claims about potential confusion on the part of, *inter alia*, cable operators concerning WKCF(TV)'s status. In so doing, however, the Commission added to, rather than resolved, any potential confusion: the Commission stated that any concern in this regard was "merely speculation" which did "not warrant Commission action at this time." 6 FCC Rcd at 6566, ¶14. In other words, the Commission seemed to be saying that its 1989 ruling had not in fact reached the copyright question and that, notwithstanding the arguments presented in the petition for reconsideration, the affirmance of the 1989 ruling was not intended to reach that question. That was the first indication provided by the Commission that its 1989 ruling had been more limited than might otherwise have been understood to be the case.

Request for Relief

15. Press believes that no party -- be it Press, any cable operator, or any other entity -- should be saddled with any copyright liability under the unique circumstances presented here.^{3/} Press submits that it would be appropriate for the Commission to determine that, from the date of the December, 1989 ruling through the date of the reconsideration order, WKCF(TV) was properly treated as a "local" station throughout the Orlando-Daytona Beach-Melbourne-Cocoa market for all purposes, including copyright liability. While such a request may be extraordinary, it is no more extraordinary

^{2/} As reflected in Attachment A hereto, the copyright liability of that particular cable system has been resolved for future purposes by Press' construction and operation of a low power television station in the Cocoa vicinity. The cable system's retransmission of the LPTV station's signal is an exempt carriage. However, that corrective measure has no effect on any liability which the cable operator may have incurred during the period *prior* to the initiation of the LPTV operation. Moreover, it is possible that, unbeknownst to Press, other cable operators are in the same dilemma.

^{3/} Press has agreed to indemnify the Cocoa cable operator from any copyright liability for the period January 1, 1990 through June 30, 1991. As noted in Note 2, *supra*, however, other cable operators may be subject to adverse consequences as a result of this situation.

than the facts which have led to this point.

16. As set out above, Press perceived a multi-faceted problem (encompassing program exclusivity and copyright components) in 1989 and took prompt and diligent steps to seek Commission resolution of that problem. Press understood itself to have obtained the desired resolution in December, 1989; the fact that at least one petition for reconsideration, filed by one of Press' competitors, appeared to be based on a similar interpretation tended to confirm Press' understanding. Consistent with that understanding was the Commission's election, in its 1989 ruling, to be less than specific in its description of the precise nature of the action being taken, together with its broad citation to Docket No. 87-24. As noted above, that latter docket independently supports Press' position that program exclusivity and the Section 76.51 listing of markets are inextricably intertwined, and that neither can be logically or rationally addressed without affecting the other.

17. Press regrets, of course, any inadvertent misunderstanding on its part concerning the import of the Commission's actions. But the history of this matter demonstrates that any such misunderstanding was not at all unreasonable. To the contrary, Press' interpretation of the 1989 ruling was reinforced by the Commission's own strongly-articulated and apparently unequivocal view that WKCF(TV) is "unavoidably competitive with other stations in the [Orlando-Daytona Beach-Melbourne-Cocoa] market". This statement, read in the context of the Commission's clear recognition of the interrelationship of program exclusivity, copyright liability, mandatory carriage, and the Section 76.51 market listing, did not suggest that the Commission might in fact be focusing exclusively on only one element of that complicated matrix of elements to the exclusion of all other such elements. To the contrary, it appeared clear in the 1989 decision that the Commission was eager to assure that all stations competing in a given market would be able to do so on an even playing field, with each subject to the same limitations as all others. But if that were in fact the Commission's intention, of what value would the right to purchase exclusive program rights throughout a market be if the purchaser were denied the ability, enjoyed by all other market stations,

to assure cable carriage exempt from copyright liability?

18. Since it was thus not unreasonable for entities such as Press or any affected cable operator to misinterpret the Commission's decision, it would be appropriate for the Commission to take steps to assure that no harm befalls those who happened to so misinterpret that decision. Such assurance can be achieved by a declaration by the Commission that, for the period between December 11, 1989 (*i.e.*, the release date of the initial ruling) and November 13, 1991 (*i.e.*, the release date of the reconsideration ruling), WKCF(TV) shall be deemed to have been a "local" station for such purposes as necessary to exempt any cable system in the Orlando-Daytona Beach-Melbourne-Cocoa market from copyright liability for carriage of WKCF(TV) during that period.

19. A simpler way of stating this might be to say that, during the relevant period, WKCF(TV) shall be deemed to have been entitled to mandatory cable carriage throughout the Orlando-Daytona Beach-Melbourne-Cocoa market. However, in light of the defunct status of the Commission's mandatory carriage program, Press understands that the Commission may not wish to take any action which appears to suggest that that program is still being implemented in any manner by the Commission. Nevertheless, the fact remains that, under the Copyright Act, important consequences *do* continue to hinge on the Commission's mandatory carriage rules, even if those rules are no longer being enforced. Those important consequences directly affect the ability of broadcasters to compete effectively in the marketplace. Thus, while the Commission may not wish to breathe life back into "must-carry", it cannot reasonably ignore the on-going impact that at least this one aspect of its "must-carry" program continues to exert.

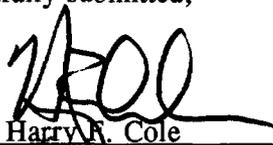
20. Press understands that the Commission is focusing on precisely these matters in Docket No. 87-24 -- the proceeding which the Commission specifically stated need *not* be invoked here because of the "unambiguous" nature of the facts of WKCF's situation, *see* 4 FCC Rcd at 8801, ¶12. Accordingly, simultaneously with the submission of the instant petition, Press is also filing a Petition for Rule Making in which it proposes that the title of the "Orlando-Daytona Beach-Melbourn-Cocoa"

market designation be modified to include "Clermont". That proposal may be considered independently of Docket No. 87-24, or as a part of that docket, as the Commission so chooses. And Press acknowledges that, pending action on Press' petition for reconsideration, Clermont would not be treated as being included as a designated community within the market for copyright purposes.^{4/}

21. But because the apparent need for this approach has come to light only since the issuance of the Commission's November, 1991 reconsideration decision, Press submits that such treatment be accorded only prospectively from the date of that decision. Any other approach would unfairly penalize parties for reasonable actions taken in the face of, at the very least, ambiguous statements by the Commission.

WHEREFORE, for the reasons stated, Press Broadcasting Company, Inc. requests that the Commission issue a ruling to the effect that, during the period December 11, 1989 through November 13, 1991, WKCF will be deemed to have been a "local" signal in the Orlando-Daytona Beach-Melbourne-Cocoa television market so that carriage of the station by cable systems in that market was exempt from copyright liability during that period.

Respectfully submitted,


/s/ Harry F. Cole
Harry F. Cole

Bechtel & Cole, Chartered
1901 L Street, N.W. - Suite 250
Washington, D.C. 20036
(202) 833-4190

Counsel for Press Broadcasting
Company, Inc.

May 4, 1992

^{4/} Press does understand that the waiver granted to it in 1989 with respect to program exclusivity remains in full force and effect.